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AGENCY FOR INTERNATIONAL DEVELOPMENT

22 CFR Part 205

RIN 0412-AA75

Amendment to Participation by Religious Organizations in
USAID Programs to Implement Executive Order 13559

AGENCY: U.S Agency for International Development.

ACTION: Proposed rule.

SUMMARY: The U.S. Agency for International Development (USAID) is proposing to amend its regulations governing the participation by religious organizations in USAID's programs to reflect guidance from the Interagency Working Group on Faith-Based and Other Neighborhood Partnerships on implementing Executive Order 13559.

DATES: Submit comments on or before [FEDERAL REGISTER
INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE
FEDERAL REGISTER.]

ADDRESSES: Address all comments concerning this proposed rule to C. Eduardo Vargas, Center for Faith-Based & Community Initiatives (A/AID/CFBCI), U.S Agency for International Development, Room 6.07-100 RRB, 1300 Pennsylvania Avenue, NW, Washington, DC 20523. Submit comments, identified by title of the action and Regulatory Information Number (RIN) by any of the following methods: Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments. E-mail: Submit electronic comments to FBCI@usaid.gov. See SUPPLEMENTARY INFORMATION for file formats and other information about electronic filing. Mail: USAID, Center for Faith-Based & Community Initiatives (A/AID/CFBCI), Room 6.07-100, 1300 Pennsylvania Avenue, NW, Washington, DC 20523. A copy of each communication submitted will be available for inspection and copying between 8:30 a.m. and 5:30 p.m. at the above address.

FOR FURTHER INFORMATION CONTACT: Mark Brinkmoeller, Director, Center for Faith-Based and Community Initiatives, USAID, Room 6.07-023, 1300 Pennsylvania Avenue, N.W.,

Washington, D.C. 20523; *telephone*: (202) 712-4080 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

On December 12, 2002, President Bush signed Executive Order 13279, Equal Protection of the Laws for Faith-Based and Community Organizations, 67 FR 77141. Executive Order 13279 set forth the principles and policymaking criteria to guide Federal agencies in formulating and developing policies with implications for faith-based organizations and other community organizations, to ensure equal protection of the laws for faith-based and other community organizations, and to expand opportunities for, and strengthen the capacity of, faith-based and other community organizations to meet social needs in America's communities. In addition, Executive Order 13279 asked specified agency heads to review and evaluate existing policies relating to Federal financial assistance for social services programs and, where appropriate, to implement new policies that were consistent with and necessary to further the fundamental principles and

policymaking criteria that have implications for faith-based and community organizations.

On October 20, 2004, USAID published its final rule (the "Original Rule") on participation by religious organizations in USAID programs (69 FR 61,716, codified at 22 CFR parts 202, 205, 211, and 226). The Original Rule implemented Executive Branch policy that, within the framework of constitutional guidelines, religious organizations should be able to compete on an equal footing with other organizations for USAID funding. The Original Rule revised USAID regulations pertaining to grants, cooperative agreements and contracts awarded for the purpose of administering grant programs to ensure their compliance with this policy and to clarify that religious organizations are eligible to participate in programs on the same basis as any other organization, with respect to programs for which such other organizations are eligible.

Shortly after taking office, President Obama signed Executive Order 13498, Amendments to Executive Order 13199 and Establishment of the President's Advisory Council for Faith- Based and Neighborhood Partnerships, 74 FR 6533 (Feb. 9, 2009). Executive Order 13498 changed the name of

the White House Office of Faith-Based and Community Initiatives to the White House Office of Faith-Based and Neighborhood Partnerships and established the President's Advisory Council for Faith-Based and Neighborhood Partnerships (Advisory Council). The President created the Advisory Council to bring together experts to, among other things, make recommendations to the President for changes in policies, programs, and practices that affect the delivery of services by faith-based and other neighborhood organizations.

The Advisory Council issued its recommendations in a report entitled *A New Era of Partnerships: Report of Recommendations to the President* in March 2010 (available at <http://www.whitehouse.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf>). The Advisory Council Report included recommendations to amend Executive Order 13279 in order to clarify the legal foundation of partnerships and offered a new set of fundamental principles to guide agency decision-making in administering Federal financial assistance and support to faith-based and neighborhood organizations.

President Obama signed Executive Order 13559, Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations, on November 17, 2010. 75 FR 71319 (available at <http://www.gpo.gov/fdsys/pkg/FR-2010-11-22/pdf/2010-29579.pdf>). Executive Order 13559 incorporated the Advisory Council's recommendations by making certain amendments to Executive Order 13279. In addition, Executive Order 13559 created the Interagency Working Group on Faith-Based and Other Neighborhood Partnerships (Working Group) to review and evaluate existing regulations, guidance documents, and policies.

The Executive Order also stated that, following receipt of the Working Group's report, OMB, in coordination with the Department of Justice, must issue guidance to agencies on the implementation of the order. In August 2013, OMB issued such guidance. In this guidance, OMB instructed specified agency heads to adopt regulations and guidance that will fulfill the requirements of the Executive Order and to amend regulations and guidance to ensure that they are consistent with Executive Order 13559. The guidance incorporated the Working Group's Report, which noted that

it focused largely on domestic considerations. The Report went on to note that for programs operating in foreign countries, additional considerations may be implicated, and that agencies, such as USAID, should consult with the Department of Justice on implementation of the Executive Order. Thus, the changes proposed in this rule result from those consultations.

On March 25, 2011, USAID issued a Notice of Public Rulemaking (NPRM) proposing amendments to section (d) of its Original Rule. That process is ongoing. USAID is not proposing any amendments to section (d) under this proposed rulemaking.

II. Overview of Proposed Rule

USAID proposes to amend 22 CFR part 205, Participation by Religious Organizations in USAID Programs, to make it consistent with Executive Order 13559.

Prohibited Uses of Direct Federal Financial Assistance

Part 205 and Executive Order 13279 prohibit nongovernmental organizations from using direct Federal

financial assistance (e.g., government grants, contracts, sub-grants, and subcontracts) for "inherently religious activities, such as worship, religious instruction, and proselytization." The term "inherently religious" has proven confusing. In 2006, for example, the Government Accountability Office (GAO) found that, while all 26 of the religious social service providers it interviewed said they understood the prohibition on using direct Federal financial assistance for "inherently religious activities," four of the providers described acting in ways that appeared to violate that rule. GAO, *Faith-Based and Community Initiative: Improvements in Monitoring Grantees and Measuring Performance Could Enhance Accountability*, GAO-06-616, at 34-35 (June 2006) (available at <http://www.gao.gov/new.items/d06616.pdf>).

Further, while the Supreme Court has sometimes used the term "inherently religious," it has not used it to indicate the boundary of what the Government may subsidize with direct Federal financial assistance. If the term is interpreted narrowly, it could permit actions that the Constitution prohibits. On the other hand, one could also argue that the term "inherently religious" is too broad rather than too narrow. For example, some might consider

their provision of a hot meal to a needy person to be an "inherently religious" act when it is undertaken from a sense of religious motivation or obligation, even though it has no overt religious content.

The Court has determined that the Government cannot subsidize "a specifically religious activity in an otherwise substantially secular setting." *Hunt v. McNair*, 413 U.S. 734, 743 (1973). It has also said a direct aid program impermissibly advances religion when the aid results in governmental indoctrination of religion. See *Mitchell v. Helms*, 530 U.S. 793, 808 (2000) (Thomas, J., joined by Rehnquist, C.J., Scalia, and Kennedy, JJ., plurality); *id.* at 845 (O'Connor, J., joined by Breyer, J., concurring in the judgment); *Agostini v. Felton*, 521 U.S. 203, 223 (1997). This terminology is fairly interpreted to prohibit the Government from directly subsidizing any "explicitly religious activity," including activities that involve overt religious content. Thus, direct Federal financial assistance should not be used to pay for activities such as religious instruction, devotional exercises, worship, proselytizing or evangelism; production or dissemination of devotional guides or other religious materials; or counseling in

which counselors introduce religious content. Similarly, direct Federal financial assistance may not be used to pay for equipment or supplies to the extent they are allocated to such activities.

Activities that are secular in content, such as serving meals to the needy or using a nonreligious text to teach someone to read, are not considered "explicitly religious activities" merely because the provider is religiously motivated to provide those services. The study or acknowledgement of religion as a historical or cultural reality also would not be considered an explicitly religious activity.

Likewise, it is important to emphasize that the restrictions on explicit religious content apply to content generated by the administrators of the program receiving direct Federal financial assistance, not to spontaneous comments made by individual beneficiaries about their personal lives in the context of these programs. For example, if a person administering a federally funded job skills program asks beneficiaries to describe how they gain the motivation necessary for their job searches and some beneficiaries refer to their faith or membership in a faith

community, these kinds of comments do not violate the restrictions and should not be censored. In this context, it is clear that the administrator of the government program did not orchestrate or encourage such comments.

USAID, therefore, proposes to amend its regulations to replace the term "inherently religious activities" with the term "explicitly religious activities" and define the latter term as "including activities that involve overt religious content such as worship, religious instruction, or proselytization." These changes in language will provide greater clarity and more closely match constitutional standards as they have been developed in case law.

These restrictions would not diminish existing regulatory protections for the religious identity of faith-based providers. The proposed rule would not affect, for example, organizations' ability to use religious terms in their organizational names, select board members on a religious basis, include religious references in mission statements and other organizational documents, and post religious art, messages, scriptures and symbols in buildings where Federal financial assistance is delivered.

Intermediaries

USAID proposes language that will clarify that organizations who receive USAID financial assistance through subawards must comply with the requirements relating to protections for beneficiaries and the restrictions on prohibited uses of federal financial assistance. The language of USAID's rule has always couched the requirements in the rule as applying to organizations "that receive direct financial assistance from USAID," which by its terms includes any organizations that receive such assistance, whether they did so through a prime award or a sub-award. However, to avoid any doubt, USAID proposes to add language explicitly stating that the requirements of the rule apply to organizations "that receive direct financial assistance from USAID (including through a prime award or sub-award)."

Protections for Beneficiaries

Executive Order 13559 makes it clear that all organizations that receive Federal financial assistance for the purpose of delivering social welfare services are prohibited from discriminating against beneficiaries or potential beneficiaries of those programs on the basis of

religion, a religious belief, refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. It also states that organizations offering explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction or proselytization) must not use direct Federal financial assistance to subsidize or support those activities, and that any explicitly religious activities must be offered outside of programs that are supported with direct Federal financial assistance (including through prime awards or sub- awards). In other words, to the extent that an organization provides explicitly religious activities, those activities must be offered separately in time or location from programs or services supported with direct Federal financial assistance. And, as noted above, participation in those religious activities must be completely voluntary for beneficiaries of programs supported by Federal financial assistance. USAID proposes to add language to the sections of its rule covering these concepts to conform more directly to the Executive Order language.

Political or Religious Affiliation

The proposed rule provides that decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference. USAID must instruct participants in the awarding process to refrain from taking religious affiliations or non-religious affiliations into account in this process; i.e., an organization should not receive favorable or unfavorable marks merely because it is affiliated or unaffiliated with a religious body, or related or unrelated to a specific religion. When selecting peer reviewers, the awarding entity should never ask about religious affiliation or take such matters into account. But it should encourage religious, political and professional diversity among peer reviewers by advertising for these positions in a wide variety of venues.

III. Findings and Certifications

Regulatory Planning and Review

This is not a significant regulatory action and, therefore, is not subject to review under section 6(b) of Executive Order 12866, Regulatory Planning and Review. This rule is not a major rule under 5 U.S.C. 804. The main effect of the

rule is to provide clarifying language around the types of activities that may be funded with Federal financial assistance, thereby preventing confusion in stakeholders and lessening the need for stakeholders to consult USAID for clarification on appropriate activities.

Regulatory Flexibility Act

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), USAID has considered the economic impact of the proposed rule. USAID certifies that the rule will not have a significant economic impact on a substantial number of small entities.

Paperwork Burden

This proposed rule does not impose any new recordkeeping requirements nor does it change or modify an existing information collection activity. Thus, the Paperwork Reduction Act does not apply to this proposed rule.

List of Subjects of 22 CFR Part 205

Foreign aid, Grant programs, Nonprofit organizations.

For the reasons stated in the preamble, USAID proposes to amend chapter II of title 22 of the Code of Federal Regulations as follows:

PART 205 - PARTICIPATION BY RELIGIOUS ORGANIZATIONS IN
USAID PROGRAMS

1. The authority citation for part 205 continues to read as follows:

Authority: 22 U.S.C. 2381(a) .

2. Amend § 205.1 by revising paragraphs (b), (c), (e), and (f), and adding paragraph (j), to read as follows:

§ 205.1 Grants and cooperative agreements.

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(b) Organizations that receive direct financial assistance from USAID under any USAID program (including through a prime award or sub-award) may not engage in explicitly religious activities (including activities that involve overt religious content such as worship, religious

instruction, or proselytization), as part of the programs or services directly funded with direct financial assistance from USAID. If an organization conducts such activities, the activities must be offered separately, in time or location, from the programs or services funded with direct financial assistance from USAID, and participation must be voluntary for beneficiaries of the programs or services funded with such assistance. These restrictions on explicitly religious activities do not apply to programs where USAID funds are provided to chaplains to work with inmates in prisons, detention facilities, or community correction centers, or where USAID funds are provided to religious or other organizations for programs in prisons, detention facilities, or community correction centers, in which such organizations assist chaplains in carrying out their duties.

(c) A religious organization that applies for, or participates in, USAID-funded programs or services (including through a prime award or sub-award) may retain its independence and may continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs, provided that it does not use direct financial assistance from USAID (including

through a prime award or sub-award) to support or engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization), or in any other manner prohibited by law. Among other things, a religious organization that receives financial assistance from USAID may use space in its facilities, without removing religious art, icons, scriptures, or other religious symbols. In addition, a religious organization that receives financial assistance from USAID retains its authority over its internal governance, and it may retain religious terms in its organization's name, select its board members on a religious basis, and include religious references in its organization's mission statements and other governing documents.

* * * * *

(e) An organization that participates in programs funded by financial assistance from USAID (including through a prime award or sub-award) shall not, in providing services, discriminate against a program beneficiary or potential program beneficiary on the basis of religion or religious belief, refusal to hold a religious belief, or a

refusal to attend or participate in a religious practice.

(f) No grant document, contract, agreement, covenant, memorandum of understanding, policy, or regulation that is used by USAID shall require only religious organizations to provide assurances that they will not use monies or property for explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization). Any such restrictions shall apply equally to religious and secular organizations. All organizations that participate in USAID programs (including through a prime award or sub-award), including religious ones, must carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of USAID-funded activities, including those prohibiting the use of direct financial assistance from USAID to engage in explicitly religious activities. No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by USAID shall disqualify religious organizations from participating in USAID's programs because such organizations are motivated or influenced by religious faith to provide social services, or because of their religious character or affiliation.

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(j) Decisions about awards of USAID financial assistance must be free from political interference or even the appearance of such interference and must be made on the basis of merit, not on the basis of religion or religious belief.

Mark Brinkmoeller

Director, Center for Faith-Based and Community Initiatives.

Date: April 16, 2015.

Editorial note: This document was received for publication by the Office of the Federal Register on July 21, 2015.

[FR Doc. 2015-18261 Filed: 8/5/2015 08:45 am; Publication

Date: 8/6/2015]